STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM LUCKETT IV, a Minor, by his Next Friends, BEVERLY LUCKETT and WILLIAM LUCKETT,

Plaintiffs-Appellants,

v

SOUTH MACOMB DISPOSAL AUTHORITY, a/k/a SOUTH MACOMB SANITARY DISTRICT, SOUTHEAST MACOMB SANITARY DISTRICT, a/k/a SOUTH MACOMB SANITARY DISTRICT, RICK KITTELL, and PATRICK O'CONNELL,

Defendants-Appellees.

UNPUBLISHED
March 25, 2014

No. 313280
Macomb Circuit Court
LC No. 2010-004265-NI

Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

In this suit to recover damages following a snowmobile accident, plaintiffs Beverly Luckett and William Luckett, acting as the next friends of their minor son, William Luckett IV (Billy Luckett), appeal of right the trial court's order dismissing Billy Luckett's claims against defendants Rick Kittell and Patrick O'Connell. On appeal, plaintiffs argue that the trial court erred when it determined that Kittell and O'Connell were entitled to governmental immunity and dismissed their claims on that basis; specifically, they maintain that the trial court erred when it determined that they did not present sufficient evidence to permit a jury to find that Kittell and O'Connell were grossly negligent. We agree that plaintiffs did not establish a question of fact as to whether O'Connell engaged in grossly negligent conduct that was the proximate cause of Billy Luckett's injuries. However, to the extent that Kittell had a duty to properly repair or mitigate hazards on his employer's property, we conclude there was a question of fact as to whether his acts and omissions amounted to gross negligence. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

I. BASIC FACTS

In March 2008, Brian Chambers, William Luckett, and his son, Billy Luckett, took snowmobiles out onto Lake St. Clair. William Luckett testified at his deposition that he, his son, who was 14 at the time, and Chambers, went snowmobiling on the lake at about 7:30 or 8:00 at night. They had been out on the lake for about 15 minutes when Chambers had problems with his snowmobile. William Luckett stopped to talk with Chambers. While they were all stopped and talking, Billy Luckett asked if he could take his dad's snowmobile for a ride.

William Luckett said Billy Luckett drove the snowmobile out farther onto the lake, turned left and headed north. Billy then turned around and headed south, which was back in their direction; he was driving at about 45 or 50 miles per hour. Shortly after Billy passed by, William Luckett heard a crash. He and Chambers raced south and saw that Billy had crashed into the Rio Vista Pier. Billy had been thrown from his snowmobile and was on the ice on the other side of the pier.

William Luckett stated that he and Billy had both driven past that pier many times. After emergency personnel took Billy to the hospital, William Luckett surveyed the scene of the accident because he "couldn't figure out what happened, because [Billy's] so familiar with the area and the machine and it didn't make any sense." He stood behind the snowmobile and looked at what Billy would have seen: "I just shook my head because the navigation light [on the pier] was to the right of him, and he hit to the left of the navigation light." William stated that there were no lights to the left of the position where Billy had struck the pier. He opined that Billy had struck the pier at a point about seven feet from the pier's end and that there was approximately 75 feet at the end of the pier that did not have lighting.

As a result of the snowmobile accident, Billy Luckett is quadriplegic.

In October 2010, William Luckett and his wife, Beverly Luckett, sued defendant Southeast Macomb Sanitary District (the Sanitary District)[1] as the next friends of their son, Billy Luckett. They alleged that the Disposal Authority negligently failed to ensure that the pier was properly illuminated and that its negligence proximately caused Billy Luckett's injuries. They also alleged that the pier constituted a nuisance.

After conducting discovery for several months, plaintiffs filed an amended complaint in March 2012. They continued to allege that the Sanitary District negligently maintained the pier and that the pier constituted a nuisance. However, they also alleged claims against two of the Sanitary District's employees: Kittell and O'Connell. They alleged that Kittell owed Billy Luckett a duty to ensure that the pier was safe and breached that duty by failing to ensure that the lights on the pier were working properly, which amounted to gross negligence. They similarly

[1] Plaintiffs originally sued the South Macomb Disposal Authority, but the parties later stipulated that the proper entity was the Sanitary District.

alleged that O'Connell's failure to properly train and supervise his subordinates amounted to gross negligence that proximately caused Billy Luckett's injuries.

In August 2012, the Sanitary District moved for summary disposition under MCR 2.116(C)(7) and (C)(10) on its own behalf and on behalf of its employees, O'Connell and Kittell.

The Sanitary District presented evidence that it was formed by several home rule cities to operate the cities' sewers and handle the treatment and disposal of sewage. To that end, the Sanitary District owned and maintained the Rio Vista Pier as the outflow point for a pump station that pumps excess sewage from retention basins into Lake St. Clair. As a district formed by municipalities, the Sanitary District maintained that it was a political subdivision within the meaning of MCL 691.1401(e),[2] and, accordingly, constituted a governmental agency under MCL 691.1401(a). Because it owned and operated the pier as part of its governmental function, the Sanitary District argued that it was entitled to immunity from tort liability under MCL 691.1407(1) unless plaintiffs pleaded a claim in avoidance of its governmental immunity. Finally, the Sanitary District noted that plaintiffs pleaded claims of gross negligence and nuisance against it, which claims did not fall within an exception to governmental immunity. For those reasons, the Sanitary District asked the trial court to dismiss the claims against it under MCR 2.116(C)(7).

The Sanitary District argued that Kittell and O'Connell were also entitled to governmental immunity; it argued that their actions did not amount to gross negligence that was the proximate cause of Billy Luckett's injuries. See MCL 691.1407(2)(c).

In support of the motion, the Sanitary District presented evidence that O'Connell put in place adequate measures to ensure that the pier's lights were operational or, in the event that a light was not functioning, to ensure that a temporary light was put in place pending the light's repair. It also presented evidence that he required his employees to check and log whether the lights were functioning on a daily basis and to perform and log the measures taken for lights that were not functioning. Similarly, the Sanitary District presented evidence that Kittell complied with his job responsibilities by checking the status of the pier's lights minutes before Billy Luckett's accident and recording that the lights were all functioning. Finally, the Sanitary District argued that the undisputed evidence showed that O'Connell and Kittell's acts or omissions were not the one most direct and efficient cause of Billy Luckett's injuries.

In response to the Sanitary District's motion for summary disposition, plaintiffs conceded that discovery had failed to reveal facts sufficient to support their claims against the Sanitary District. For that reason, they agreed that the trial court should dismiss the claims under MCR 2.116(C)(7). They argued, however, that there was evidence, which, if believed, would permit a reasonable jury to find that O'Connell and Kittell failed to properly maintain the pier and their

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[2] Although the events at issue occurred before the Legislature amended the statutes governing immunity, see 2012 PA 50, because the amendments did not substantively alter the statutes at issue here, we have cited the current provisions.

failure amounted to gross negligence that was the one most direct and efficient cause of Billy Luckett's injuries.

Plaintiffs relied on William Luckett's testimony that the end of the pier was not lit shortly after Billy Luckett's accident. They also presented evidence from other witnesses who agreed that the lights on the end of the pier were not lit on the night of the accident. From the evidence that the lights were off, plaintiffs argued that a reasonable jury could infer that Kittell did not actually check the lights on the night at issue or did check them and took no steps to rectify the hazard. They further argued that the evidence from the log books appeared inconsistent and suggested that there were problems with the ninth light, which is the second to last light on the pier. Plaintiffs maintained that a reasonable jury could infer from this that O'Connell was aware that there was a problem with the lights and took no steps to ensure that his employees were taking appropriate actions. Finally, plaintiffs presented testimony that Billy Luckett was an experienced snowmobiler and familiar with the pier and the area around it. They contended that a reasonable jury could rely on this evidence to infer that the one most efficient and direct cause of the accident was the failures by Kittell and O'Connell to ensure that the pier was properly lit.

The trial court issued its opinion and order on the Sanitary District's motion for summary disposition in October 2012. The trial court determined that plaintiffs failed to present evidence from which a reasonable jury could find that O'Connell or Kittell were grossly negligent. Accordingly, the trial court granted the Sanitary District's motion and dismissed all plaintiffs' claims under MCR 2.116(C)(7) and (C)(10).

Plaintiffs now appeal.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

Plaintiffs argue on appeal that the trial court erred when it granted the Sanitary District's motion for summary disposition as to plaintiffs' claims against O'Connell and Kittell. Specifically, they contend that there was evidence from which a reasonable jury could conclude that O'Connell and Kittell were grossly negligent and that their negligence was the one most direct and efficient cause of Billy Luckett's injuries. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo whether the trial court properly interpreted and applied statutes, such as the Governmental Tort Liability Act, MCL 691.1401 *et seq.* *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013).

B. IMMUNITY FOR GOVERNMENTAL EMPLOYEES

An "employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the . . . employee . . . while in the course of employment or service," if—in relevant part—the employee's conduct does not "amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(c). As this Court has explained, the "governmental immunity statute does not itself create a cause of action called 'gross negligence.'" *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421

(2009). Rather, as with every tort, the plaintiff must identify a common law duty that the governmental employee owed to him or her and must plead and be able to prove that the employee breached that duty. *Id.*; see also *Beaudrie v Henderson*, 465 Mich 124, 135; 631 NW2d 308 (2001). However, even if a governmental employee had a duty to the plaintiff and breached that duty, the governmental employee will be immune from tort liability if the employee's breach did not amount to gross negligence. MCL 691.1407(2)(c). Accordingly, the plaintiff must plead and be able to prove that the governmental employee's acts or omissions amounted to gross negligence or the employee will be immune from tort liability. *Maiden v Rozwood*, 461 Mich 109, 121-123; 597 NW2d 817 (1999).

Gross negligence "means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Because gross negligence encompasses conduct that is "substantially more than negligent," evidence of ordinary negligence is insufficient to "create a material question of fact concerning gross negligence." *Maiden*, 461 Mich at 122-123. Accordingly, a plaintiff cannot establish gross negligence by submitting evidence that the governmental employee could have "done more" or "taken additional precautions" because, even under the ordinary negligence standard, the employee is not required "to exhaust every conceivable precaution to be considered not negligent." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). As the Court in *Tarlea* explained, the gross negligence standard is far less demanding than the ordinary negligence standard:

> The much less demanding standard of care—gross negligence—suggests, instead, almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge. [*Id.*]

With these standards in mind, we now examine the evidence presented on the Sanitary District's motion for summary disposition.

C. O'CONNELL

In its motion for summary disposition, the Sanitary District presented evidence that O'Connell, who was a supervisor, had put in place procedures to ensure that the pier was properly lit. These procedures included multiple visual inspections of the lights on a daily basis, reporting and record keeping requirements, and procedures for promptly repairing malfunctioning lights or placing temporary lighting on the malfunctioning light's post. Once the Sanitary District presented evidence that O'Connell had put in place reasonable procedures for ensuring that the pier was adequately lit, plaintiffs had the burden to come forward with evidence to establish a question of fact as to whether O'Connell's procedures and supervision were so inadequate that it amounted to gross negligence. *Barnard Mfg*, 285 Mich App at 374.

In response to the Sanitary District's motion, plaintiffs relied on testimony by witnesses that the light or lights at the end of the pier were off on the night in question. They also noted that the Sanitary District's logs concerning whether the lights were functioning appeared to be inconsistent—at least with regard to light number 9—with the logs listing repairs and the placement of temporary lights. The inconsistencies, plaintiffs maintained, were sufficient to

permit a reasonable jury to find that O'Connell knew or should have known that his employees were not following the procedures and, as a result, that there might have been an "issue with the dock lighting prior to the incident." From this, the jury could further infer that O'Connell should have taken additional steps to ensure that the pier was properly lit on the day at issue and his failure to do so constituted gross negligence.

Despite claiming that O'Connell took "no action to ensure that the lights were working," there was considerable undisputed evidence that there were measures in place to ensure that the lights were working or that a substitute light was in place on a malfunctioning light. There was testimony and evidence that the Sanitary District's employees checked daily the pier's lighting and were required to take steps to promptly rectify nonfunctioning lights. From this, it is evident that plaintiffs' real contention is not that O'Connell completely failed to put in place any measures to ensure that the pier's lights were functioning properly, but that he failed to more fully and comprehensively supervise his employees, which made it possible that a malfunctioning light would not be reported, repaired, or otherwise mitigated. Indeed, plaintiffs emphasized that O'Connell admitted that he had no way of knowing whether his employees actually checked the lights before making a log entry. Plaintiffs seem to assert that O'Connell should have assumed, presumably on the basis of the inconsistencies in the logs, that his employees were not actually checking the lights, not repairing the lights, and not placing temporary lighting when necessary. As such, he should have taken additional steps to be certain that the lights were working on the night at issue.

Even viewing these log entries in the light most favorable to plaintiffs, *Maiden*, 461 Mich at 120, the apparent inconsistencies do not permit an inference that the Sanitary District's employees so regularly and completely failed to repair or mitigate nonfunctioning lights that there was a significant possibility that the pier was improperly lit. The log evidence was not of such a character that it would support an inference that O'Connell's failure to provide better procedures or to directly intervene on the day at issue amounted to a willful disregard of precautions to protect the public from the danger posed by the pier, *Tarlea*, 263 Mich App at 90, or demonstrated that he had "a substantial lack of concern" for whether someone might be injured, MCL 691.1407(7)(a). To the extent that a reasonable jury could conclude that there were shortcomings in the system to check and repair the lights, those shortcomings were at most evidence of ordinary negligence, which was insufficient to overcome the immunity provided to governmental employees. *Maiden*, 461 Mich at 122-123. Consequently, given the evidence before it on the motion for summary disposition, the trial court did not err when it dismissed the claim against O'Connell under MCR 2.116(C)(7).

D. KITTELL

In its motion for summary disposition, the Sanitary District presented evidence that Kittell followed the procedures put in place to ensure that the lights on the pier were functioning properly. Kittell testified that he checked the pier's lights on the night at issue by driving to a point near the pier and visually verifying that the lights were all functioning. Kittell recorded an entry in the log noting that the lights were all on at 8:11 pm, which was around twenty minutes before Billy Luckett's accident. Because the lights were on, no further action was necessary. Plaintiffs responded to this testimony and evidence by presenting evidence that the light at the

end of the pier—light number 10—and possibly additional lights were out shortly after Billy Luckett's accident.

Although the evidence concerning whether the pier's lights were functioning at the time of the accident plainly conflicts, the testimony that the lights at the end of the pier were out shortly after Billy Luckett's accident permits an inference that the lights were also out prior to his accident. From this, a reasonable jury could further infer that Kittell knew or should have known that the lights on the end of the pier were out when he checked the lights. Moreover, William Luckett testified that they had gone out onto the lake to snowmobile before Kittell entered his observations into the log. From this, a reasonable jury could infer that Kittell not only knew that the light or lights at the end of the pier were out, but also knew or should have known that persons were out on the lake operating snowmobiles. Finally, to the extent that Kittell owed Billy Luckett a duty to repair or mitigate hazards on his employer's property, a reasonable jury could find that Kittell's failure to take any steps to repair or mitigate the hazard posed by the nonfunctioning lights—especially given that the lights involved were those marking the end of the pier—amounted to a willful disregard for the danger posed by the unlit end of the pier to the snowmobilers. *Tarlea*, 263 Mich App at 90. Hence, when viewing the evidence in the light most favorable to plaintiffs, there was a question of fact as to whether Kittell's acts or omissions amounted to gross negligence. Accordingly, the trial court erred when it granted summary disposition of plaintiffs' claim against Kittell on that basis. *Radu v Herndon & Herndon Investigations, Inc*, 302 Mich App 363, 383; 838 NW2d 720 (2013) (stating that a trial court should only grant summary disposition if no reasonable jury could find that the employee's conduct amounted to gross negligence).

Before the trial court, the Sanitary District argued that—even if a reasonable jury could find that Kittell's acts or omissions amounted to gross negligence—the trial court should nevertheless dismiss the claim against Kittell because the undisputed evidence showed that Kittell's acts or omissions were not the one most immediate, efficient, and direct cause of the accident. The Sanitary District argues on appeal that this Court should affirm on this alternate basis should we determine that a reasonable jury could find gross negligence.

As this Court has explained, the Legislature's grant of immunity to governmental employees does not apply if the employee engaged in "gross negligence" and the employee's gross negligence was "the proximate cause" of the plaintiff's injury:

> The Legislature has provided that a governmental employee is immune from tort liability unless his or her conduct amounted "to gross negligence" and that gross negligence was "*the* proximate cause of the injury or damage." MCL 691.1407(2)(c) (emphasis added). Our Supreme Court has held that the Legislature's reference to "the proximate cause"—as opposed to "a proximate cause"—means that the employee's gross negligence must be more than just a proximate cause of the injury in order to meet the requirements of the exception to the governmental employee's immunity. See *Robinson v Detroit*, 462 Mich 439, 461-463; 613 NW2d 307 (2000). Instead, a governmental employee is immune from tort liability unless his or her conduct amounted to gross negligence that was "the one most immediate, efficient, and direct cause of the injury or damage . . . ."

> *Id.* at 462. [*LaMeau v Royal Oak*, 289 Mich App 153, 181; 796 NW2d 106 (2010), rev'd not in relevant part 490 Mich 949 (2011).]

For that reason, in addition to presenting evidence from which a reasonable jury could conclude that the governmental employee's acts or omissions amounted to gross negligence, the plaintiff must present evidence from which a reasonable jury could find that the employee's acts or omissions were the one most immediate, efficient, and direct cause of the plaintiff's injuries.

Here, there was evidence from which a jury could find that Billy Luckett's own negligence was the most immediate, efficient, and direct cause of the accident. There was evidence that he proceeded north, turned around, and then drove south past his father and his father's friend at a high rate of speed. He was driving at night, which plainly reduced his ability to see any obstructions on the ice. There was also evidence that Billy Luckett did not engage the breaks on the snowmobile until just before he struck the pier. From this evidence, a reasonable jury could conclude that Billy Luckett was not operating the snowmobile at a safe speed considering the conditions and, therefore, was primarily at fault for his accident. However, there is also evidence from which a reasonable jury could conclude that Kittell was the one most immediate, efficient, and direct cause of the accident.

From the evidence that the lights on the end of the pier were not on shortly after Billy Luckett's accident, a reasonable jury could find that the lights were not working even before the accident. William Luckett testified that his son was familiar with the bay where they were operating their snowmobiles, including the pier, and that Billy Luckett was an experienced snowmobiler. He also stated that Billy proceeded to drive farther out onto the lake before he headed north and turned to head south. Given this testimony, a reasonable jury could find that Billy Luckett was aware of the pier and drove out further onto the lake in order to ensure that he would avoid the pier once he turned south. Moreover, a reasonable jury could infer that the only reason Billy Luckett failed to avoid the pier was because he mistakenly believed that he was out far enough to avoid the pier and that he got that impression from the lights on the pier. That is, a reasonable jury could find that the only reason Billy Luckett failed to avoid the pier was because the lights on the end of the pier were not functioning. Consequently, there was evidence from which a reasonable jury could find that the lack of lighting on the end of the pier was the one most immediate, efficient, and direct cause of Billy Luckett's accident.

To the extent that Kittell breached a duty to repair or mitigate the lights on the pier, the trial court erred when it dismissed plaintiffs' claim against Kittell under MCR 2.116(C)(7) and (C)(10).

III. CONCLUSION

The trial court did not err when it determined that plaintiffs failed to present evidence from which a reasonable jury could conclude that O'Connell was grossly negligent. As such, the trial properly dismissed plaintiffs' claim against O'Connell. However, the trial court erred when it determined that plaintiffs also failed to present evidence from which a reasonable jury could find that Kittell was grossly negligent and that his gross negligence was the one most immediate, efficient, and direct cause of Billy Luckett's accident.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Because none of the parties prevailed in full, none may tax costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood